90-1894

No. ———

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND ITS LOCAL 304A,
*Petitioners,*

v.

JOHN MORRELL & CO.,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This *certiorari* petition grows out of two cases—one an action for an alleged breach of a labor contract, the other an action to overturn an arbitration award—which were consolidated below in a single appeal.

The breach-of-contract action raises the following questions:

1. Whether a limited no-strike clause—which does not prohibit all strikes but rather prohibits only strikes over specified contract disputes between the contracting parties—clearly and unmistakably waives the statutory right of the covered employees, conferred by the National Labor Relations Act, to concertedly honor a picket line lawfully established by employees engaged in an economic dispute with the employer?

2. Whether extrinsic evidence can properly be relied upon to transform an "ambiguous" provision of a collective bargaining agreement into a "clear and unmistakable" waiver of a statutory right conferred on the covered employees by the National Labor Relations Act, or whether, *per contra*, such a waiver must be clearly stated in the contract's text?

The action to overturn the arbitration award raises the following questions:

3. Whether an arbitrator, in adjudicating an arbitrable grievance, exceeds the scope of his authority by deciding an issue which, in the view of a reviewing court, one of the parties did not intend to submit to arbitration but which the arbitrator found to be necessarily posed by the grievance?

4. Whether an arbitrator, in adjudicating an arbitrable grievance, is required to give collateral es-

toppel effect to a prior jury verdict interpreting the collective bargaining agreement?

5. Whether a jury verdict in the liability phase of a trial is entitled to collateral estoppel effect before judgment is entered on that verdict and before the verdict is subject to appeal?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| The Breach of Contract Action | 2 |
| The Arbitration Action | 4 |
| The Decision of the Court of Appeals | 5 |
| REASONS FOR GRANTING THE WRIT | 6 |
| I. THE DECISION BELOW RAISES AN IMPORTANT UNRESOLVED QUESTION AS TO WHICH THE COURTS OF APPEALS ARE IN DISARRAY REGARDING THE PROPER INTERPRETATION AND LEGAL EFFECT OF NO-STRIKE CLAUSES WITH RESPECT TO SYMPATHY STRIKES | 6 |
| II. THE DECISION BELOW RAISES IMPORTANT AND UNRESOLVED QUESTIONS REGARDING THE RESPECTIVE ROLES OF COURTS AND LABOR ARBITRATORS IN THE ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS | 23 |
| CONCLUSION | 30 |

## TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Allis-Chalmers v. Leuck*, 471 U.S. 202 (1985) | 10 |
| *Amcar Division, ACF Industries v. NLRB*, 641 F.2d 561 (8th Cir. 1981) | 12 |
| *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986) | 24 |
| *Avondale Shipyard, Inc. v. Insured Lloyd's*, 786 F.2d 1265 (5th Cir. 1986) | 30 |
| *Bristol Convalescent Home*, 293 NLRB No. 73 | 13, 14 |
| *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) | 28 |
| *Delaware Coca-Cola Bottling Co., Inc. v. NLRB*, 624 F.2d 1182 (3rd Cir. 1980) | 17 |
| *Electrical Workers v. Hechler*, 481 U.S. 851 (1987) | 19 |
| *Electrical Workers Local 808 v. NLRB*, 826 F.2d 1283 (3rd Cir. 1987) | 15 |
| *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986) | 16 |
| *Food and Commercal Workers Local 7R v. Safeway*, 889 F.2d 940 (10th Cir. 1989) | 25 |
| *G. & C. Merriam Co. v. Saalfield*, 291 U.S. 22 (1916) | 29 |
| *Gary Hobart Water Corp.*, 210 NLRB 742 (1974) | 13 |
| *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284 (7th Cir. 1975), *cert. denied*, 423 U.S. 925 | 8, 9, 10, 11, 12, 19 |
| *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 58 U.S.L.W. 3595 (1990) | 30 |
| *Indianapolis Power & Light Co.*, 291 NLRB No. 145 (1988) | 11, 14 |
| *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524 (7th Cir. 1990) | 11 |
| *John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 804 F.2d 457 (8th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1014 (1987) | 3 |
| *Johnston Boiler Co. v. Local Lodge 893*, 753 F.2d 40 (6th Cir. 1985) | 26 |

TABLE OF AUTHORITIES—Continued

Page

*Keller-Crescent Co.*, 217 NLRB 658 (1975), *enf. denied*, 538 F.2d 1291 (7th Cir. 1976) ..... 16
*Labor Board v. Insurance Agents*, 361 U.S. 477 (1960) ..... 17
*Labor Board v. Rockaway News Supply*, 345 U.S. 71 (1953) ..... 15, 16
*Luben Industries, Inc. v. United States*, 707 F.2d 1037 (9th Cir. 1983) ..... 30
*Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 ..... 29
*McDonald v. City of West Branch*, 466 U.S. 284 (1984) ..... 28
*Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270 (1956) ..... 16, 19
*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) ..... 16, 18, 19
*Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299 (3rd Cir. 1982) ..... 26
*NLRB v. C.K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977) ..... 17
*NLRB v. Gould Inc.*, 638 F.2d 159 (10th Cir. 1980) ..... 17
*NLRB v. Southern California Edison Co.*, 646 F.2d 1352 (9th Cir. 1981) ..... 17
*NLRB v. United Technologies Corp.*, 884 F.2d 1569 (2d Cir. 1989) ..... 19
*Operating Engineers Local 18 (Davis-McKee, Inc.)*, 238 NLRB 652 (1978) ..... 16
*Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455 (3rd Cir. 1981) ..... 17
*Pack Concrete Inc. v. Cunningham*, 866 F.2d 283 (9th Cir. 1989) ..... 26
*Paperworkers Union v. Misco*, 484 U.S. 29 (1987) ..... 23
*Ryder Truck Lines, Inc. v. Teamsters Local 480*, 727 F.2d 594 (6th Cir. 1984), *cert. denied sub nom. Teamsters Freight Local 480 v. Ryder Truck Lines*, 469 U.S. 825 (1984) ..... 17

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Standefer v. United States*, 447 U.S. 10 (1980) | 30 |
| *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960) | 29 |
| *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960) | 24 |
| *United States Steel Corp. v. NLRB*, 711 F.2d 772 (7th Cir. 1983) | 9 |
| *W-I Canteen Service Inc. v. NLRB*, 606 F.2d 738 (7th Cir. 1979) | 17 |
| *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983) | 27, 29 |
| *Waterfront Employees Association*, 4 L.R.R.M. 1117 (1939) | 20 |
| **STATUTES** | |
| 28 U.S.C. § 1254(1) | 1 |
| National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq. | 7 |
| Labor Management Relations Act, 29 U.S.C. § 301, 29 U.S.C. § 185 | 2 |
| **MISCELLANEOUS** | |
| S. Rep. No. 105, 80th Cong. 1st Sess. p. 16 (1947) | 18 |
| 2 Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts* at 77:1 (1987) | 6, 7 |

## PETITION FOR A WRIT OF CERTIORARI

Petitioners United Food and Commercial Workers International Union, AFL-CIO and its Local 304A (collectively referred to as "the Union"), respectfully petition this Court to issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit in *Food and Commercial Workers Local 304A et al. v. John Morrell & Co.*, Eighth Circuit C.A. Nos. 89-5109, 89-5152.

## OPINIONS BELOW

The Eighth Circuit's opinion and judgment as to which review is sought is reported at 913 F.2d 544 and is reprinted in the separately bound appendix to this *certiorari* petition as Apendix A. Pet. App. 1a. The underlying district court memorandum opinion and order vacating the arbitration award at issue here is reported at 708 F.Supp. 273 and is reprinted at Appendix B. Pet. App. 46a. The district court's order denying the Union's post-verdict motion for judgment notwithstanding the verdict in the underlying breach of contract action is unreported and is reprinted as Appendix C. Pet. App. 57a. The earlier opinion of the court of appeals vacating an injunction against the Union's sympathy strikes is reported at 804 F.2d 457 and is reprinted as Appendix D. Pet. App. 60a. The memorandum opinion of the district court granting that strike injunction is reported at 641 F.Supp. 803 and is reprinted as Appendix E. Pet. App. 70a. The arbitration award at issue here is unreported and is printed as Appendix H. Pet. App. 83a.

## JURISDICTION

The judgment of the court of appeals panel was entered on September 7, 1990. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on December 6, 1990. Pet. App. 79a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are set forth in the Statutory Appendix at the end of this petition.

## STATEMENT OF THE CASE

In August, 1986 the workers at the Ark City plant of respondent John Morrell & Co. ("Morrell") commenced a lawful strike against Morrell to secure a new collective bargaining agreement to succeed the Ark City agreement that had expired. In March, 1987 the workers at Morrell's Sioux City plant did likewise. Pet. App. 2a, 4a.

In support of each strike, the strikers placed a lawful picket line at Morrell's Sioux Falls plant in an effort to induce the Sioux Falls employees to refrain from working and thereby to increase the economic pressure on Morrell. On each occasion, the Sioux Falls employees honored the picket line and refused to report to work. *Id.* This proceeding involves two cases arising out of the Sioux Falls work stoppages.

### The Breach of Contract Action

The first case is a breach-of-contract action commenced by Morrell under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("LMRA"), against the Union, which is the collective bargaining representative of the Sioux Falls plant's employees. Morrell's complaint alleged that the Union had waived the Sioux Falls employees' right to honor the lawful picket line set up by their fellow-workers at other plants and that the sympathy strike was thus in breach of contract. Pet. App. 3a. Morrell based that contention on the no-strike provision of the collective bargaining agreement governing the Sioux Falls plant which provides as follows:

> Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the

> term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the Union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements. [1985-88 Sioux Falls Collective Bargaining Agreement, Article II, cl. 5, Pet. App. 3a.]

At Morrell's request, the district court granted a preliminary injunction against the sympathy strike. The Union appealed and a panel of the Eighth Circuit unanimously reversed. In so doing, the panel ruled, first, that "*the parties' no-strike clause did not prohibit sympathy strikes*," Pet. App. 65a (emphasis added); and, second, that there was insufficient evidence in the preliminary injunction record to support the district court's conclusion that the Sioux Falls employees' refusal to cross the Ark City employees' picket line was not truly a sympathy strike but was a pretext for a strike over a dispute between Morrell and the Sioux Falls employees, Pet. App. 66a.

On remand, the Union moved for summary judgment. The district court ruled, contrary to the determination of the Eighth Circuit in *Morrell I*, "that a jury should decide . . . whether the no-strike provision of the collective bargaining agreement prohibited sympathy strikes." Pet. App. 5a.

Following a ten-day trial, the jury returned a verdict for Morrell on liability. A second jury was empaneled to determine the damages owed to Morrell; that jury rendered a verdict in the amount of $24,600,000. Judgment was entered on these verdicts and the Union appealed. Pet. App. 2a, 47a.

**The Arbitration Action**

In November, 1987, prior to the trial in the breach-of-contract action, the Sioux City employees removed their picket line at the Sioux Falls plant and the Sioux Falls

employees ended their sympathy strike. The Sioux Falls sympathy strikers at that time made an unconditional offer to return to work. But, Morrell did not rehire any of the sympathy strikers until January, 1988, and those who were recalled were not permitted to exercise their full seniority rights. Pet. App. 85a-86a.

The Union immediately filed grievances which were submitted to Arbitrator William Rentfro, a professor of law at the University of Colorado School of Law and one of the three arbitrators designated by the parties to resolve disputes under the Sioux Falls collective bargaining agreement. On November 5, 1988, Arbitrator Rentfro rendered a twenty-seven page opinion and award sustaining the grievances. Pet. App. 83a ff.

In reaching his conclusion the Arbitrator began by stating that to resolve "what rights, if any, this contract gives the sympathy strikers vis a vis the cross-overs and replacements" it was necessary to decide whether the sympathy strike constituted a breach of the collective bargaining agreement. Arbitrator Rentfro explained that the parties' contrary arguments with respect to the ultimate issue before him reflected their conflicting "premises" and 'fundamental disagreement" over the lawfulness of the sympathy strike. Pet. App. 91a.

Arbitrator Rentfro went on to conclude that, in light of the Eighth Circuit's opinion on the first appeal stating that "the parties' no-strike clause did not prohibit sympathy strikes" and in light of the contrary conclusion of the jury, "the Arbitrator feels he has the obligation to make an independent evaluation and finding on the issue of whether the contract allows sympathy strikes." Pet. App. 92a. And after considering the language of the no-strike provision against the background of labor usages, the Arbitrator found it to be "beyond credulity that this clause could be understood by two parties as experienced in labor relations as UFCW and Morrell to be a clear and unmistakable waiver of the right to engage in a sympathy strike." Pet. App. 96a.

Morrell filed an action seeking to have the Arbitrator's award vacated, and on March 15, 1989, the district court did vacate the award. The Union's appeal from this decision was consolidated with the appeal from the judgment in the breach-of-contract-action. Pet. App. 2a, 46a.

**The Decision of the Court of Appeals**

On September 7, 1990, a panel of the Eighth Circuit, by a divided vote, affirmed both judgments of the district court. Pet. App. 1a.

With respect to the breach of contract action, the panel majority concluded that the ruling on the first appeal that "the parties' no-strike clause did not prohibit sympathy strikes" was "not decisive on the issue of the impact of the no-strike clause on sympathy strikes." Pet. App. 7a. The majority went on to find that notwithstanding the limited terms of the instant no-strike clause —which references the parties' dispute-resolution procedures and prohibits strikes over "*such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the . . . agreements*" —the language is " 'ambiguous' in the sense that it is reasonably susceptible of the meaning proposed by Morrell." Pet. App. 10a. On that basis, the panel majority concluded that the district court had properly left it to the jury to decide whether the no-strike clause had the legal effect of waiving the employees' right to engage in sympathy strikes. Pet. App. 15a-16a.

With respect to the arbitration action, the panel majority agreed with the district court on two grounds. First, the panel majority concluded that even though the Arbitrator had found that the lawfulness *vel non* of the sympathy strike was a threshold issue necessarily raised by the grievance over Morrell's treatment of sympathy strikers, the Arbitrator had exceeded his authority by resolving this issue because the panel majority was "not persuaded that . . . Morrell intended to arbitrate the meaning of the no-strike clause." Pet. App. 29a. Al-

ternatively, the panel majority concluded that "the arbitrator was barred from reconsidering the issue decided in the prior judicial proceeding" notwithstanding the arbitrator's role as proctor of the bargain and notwithstanding the fact that the "prior judicial proceeding" was at that point a jury verdict on which judgment had not yet been entered and which had never been subject to appeal. Pet. App. 34a-36a.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW RAISES AN IMPORTANT AND UNRESOLVED QUESTION AS TO WHICH THE COURTS OF APPEALS ARE IN CONFLICT REGARDING THE PROPER INTERPRETATION AND LEGAL EFFECT OF NO-STRIKE CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS

The breach-of-contract action decided below concerns the right of organized employees who are covered by a collective bargaining agreement to exercise their statutory right to concertedly honor a lawful picket line established by other employees of the same employer who are engaged in a labor dispute with the employer, *viz.*, the right to engage in a "sympathy strike." The Eighth Circuit panel majority's holding that the Sioux Falls plant employees had waived that right in their collective bargaining agreement's limited no-strike clause places that court's law on the rules governing the proper interpretation of this common class of contract provisions in direct conflict with the law of the Seventh Circuit.

This conflict is of profound practical and doctrinal significance. Because some 94% of all collective bargaining agreements contain a no-strike pledge of one kind or another, 2 Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts* at 77:1 (1987)—and because few such provisions treat, in terms, with the covered employees' right to honor a lawful picket line—the question of whether and when a no-strike clause proscribes sympathy strikes is of great moment to the parties and to the proper administration of the labor laws.

At the same time, the conflict between the Seventh and Eighth Circuits on this point is the result of—and serves to focus—a deeper division as to the governing interpretative rules where, as here, it is claimed that a labor contract waives a statutory right of employees covered by that contract.

In particular, the lower courts are in disagreement as to whether such a waiver must be stated in the contract's text or whether, and in what circumstances, extrinsic evidence as to the parties' intent can suffice. And that disagreement, in turn, goes to the essential meaning of the well-settled proposition that only clear and unmistakable waivers of the statutory rights created by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, as amended, are to be given legal effect.

For all these reasons, which we proceed to develop in detail, this case calls for review by this Court.

A. "No-strike pledges . . . fall[] into two general categories: 1) unconditional bans on interference with production during the life of the contract; and 2) conditional bans which permit strikes under certain circumstances." *Collective Bargaining Negotiations and Contracts*, *supra*, at 77:1.

The no-strike clause at issue here—like some 34% of all no-strike clauses, *id.*—is of the latter kind. In contrast to an "unconditional" no-strike clause—which, without qualification, states that "any," 'all," or "every" strike during the life of the contract is prohibited—the instant clause *states a more limited promise* banning strikes "on account of" a specified class of "disputes," *viz.*, "disputes" for which "[p]rovisions hav[e] been made by this Agreement . . . for . . . peaceful and orderly settlement." Pp. 2-3 *supra*.[1]

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[1] Even as to these disputes, the no-strike obligation by its terms extends only "until after an earnest effort shall be made to settle . . . in the manner provided in the . . . agreement[]." *Id.*

The holding below that such a limited no-strike clause can be properly interpreted as a waiver of the covered employees' right to honor a lawful picket line is in square conflict with the Seventh Circuit's decision in *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284 (7th Cir. 1975), *cert. denied*, 423 U.S. 925.

*Gary Hobart* involved a no-strike clause contained within the grievance provision of a collective bargaining agreement. That clause stated that

> there shall be no strike, stoppages of work or any other form of interference with any of the production or other operations of the Company by the Union or its members and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure. [511 F.2d at 287-288.]

The Seventh Circuit concluded that the language of this no-strike clause "indicates an intention to treat the no-strike clause as having application coextensively with that of the arbitration clause." *Id.* at 288. That being so, the provision did "not . . . affect the right to engage in a sympathy strike" because

> The refusal to dishonor another local union's picket line or engage in a sympathy strike in connection with another local's strike are not disputes or controversies arising under or in connection with the first local union's agreement and are therefore neither arbitrable nor subject to the no-strike provisions. [*Id.*]

"[I]n any event," the *Gary Hobart* court added, the governing rule is that "the relinquishment of a collective bargaining right" is "effectuated" only by a waiver that is in "clear and unmistakable language"; and, said that court, a no-strike clause which is linked to an arbitration clause "is not clear and unmistakable language waiving that right [*viz.*, the right to engage in a sympathy strike]." *Id.* at 287-288.

The conflict between *Gary Hobart* and the decision below could not be clearer. Here, as in *Gary Hobart*, the no-strike clause on its face "indicates an intention" that the no-strike clause is to "hav[e] application coextensively with that of the arbitration clause," 511 F.2d at 288. Indeed, in this case, the no-strike clause is not simply conjoined with the arbitration provision but is, *in terms*, a limited promise not to strike "on account of such [*viz.*, arbitrable] disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements." Pp. 2-3 *supra*.

Yet the court below—after acknowledging that *Gary Hobart* "applied the doctrine of coterminous application" to reject a claim that a limited no-strike clause can be extended to sympathy strikes—expressly held that the "doctrine of coterminous application does *not* govern our interpretation of the no-strike clause." Pet. App. 14a (emphasis added). The Eighth Circuit panel majority then went on to uphold a jury verdict finding in the limited no-strike clause at issue here a waiver of the right to engage in sympathy strikes. Pet. App. 17a.[2]

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[2] The court below attempted to reconcile its decision in the instant case with the Seventh Circuit law by invoking *United States Steel Corp. v. NLRB*, 711 F.2d 772 (7th Cir. 1983). The panel majority here claimed that *United States Steel* "refused to apply the doctrine [of coterminous application] when the extrinsic evidence indicated that the parties intended otherwise." Pet. App. 14a. But in *United States Steel*, the Seventh Circuit stated its holding in far more limited terms:

> We therefore hold that *where a broad no-strike clause is functionally independent of an arbitration clause in a labor contract* and the contract shows that the no-strike obligation was not given merely in exchange for the duty to arbitrate but because of the parties' common interest in achieving uninterrupted plant operations, the no-strike clause constitutes a clear and unmistakable waiver of an employee's right to engage in a sympathy strike. [711 F.2d at 780 (emphasis added).]

And *United States Steel* carefully distinguished *Gary Hobart* on the ground that *Gary Hobart* involved a *limited*—rather than a broad—no-strike clause, *viz.*, a clause "directly intertwined" with

The end result is that limited no-strike clauses have a *differing legal meaning* in the two adjacent circuits which together cover a large portion of the industrial mid-west. In the Seventh Circuit, a claim that such a clause bars a sympathy strike results in summary judgment for the *defendant*; in the Eighth Circuit such a claim is subject to a trial by jury and can, as happened here, generate a multi-million dollar judgment for the *plaintiff*.

That is the very result Congress sought to avoid in enacting § 301 of the Labor Management Relations Act, 29 U.S.C. § 158. Section 301 is "a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985). It follows that the "interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given to a contract phrase or term be subject to uniform federal interpretation." *Id.* at 211. The circuit conflict we have detailed defeats those interests.

B. (1) The conflict between *Gary Hobart* and the decision below reflects the Seventh and Eighth Circuits' conflicting approaches to determining when a provision in a collective bargaining agreement has the effect of waiving the covered employees' statutory rights stated in the NLRA.

In *Gary Hobart*, the Seventh Circuit proceeded from the premise that a labor contract provision is *not* to be deemed to waive a statutory right unless the provision contains "clear and unmistakable language waiving that

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the grievance and arbitration procedure and as to which it "was reasonable there to infer that the arbitration and no-strike provisions had the same scope." 711 F.2d at 779.

Thus, contrary to the suggestion below, *Gary Hobart* remains good law in the Seventh Circuit and is in direct conflict with the decision below.

right." 511 F.2d at 288. Because, by definition, the "language" of a *limited* no-strike clause does not, on its face, state a "clear and unmistakable" surrender of the right to engage in sympathy strikes, the *Gary Hobart* court concluded that "the bargaining history need not be examined in order to interpret the language of the collective bargaining agreement." *Id.*[3]

Only where a no-strike clause is, on its face, "all-encompassing"—*viz.*, only where the contract language on its face evidences a clear and unmistakable waiver—will the Seventh Circuit examine extrinsic evidence as to the parties' intent to determine whether "the parties intended to include sympathy strikes within the purview of the no-strike clause." *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524, 528 (7th Cir. 1990) *enforcing* 291 NLRB No. 145 (1988); *see also United States Steel, supra.*

The Eighth Circuit's approach to determining whether a waiver of a statutory right has been effectuated could not be more different. The panel majority here summarized its method of analysis as follows:

> [W]e must . . . decide whether the no-strike clause is "ambiguous" in the sense that it is reasonably susceptible of the meaning proposed by Morrell, namely, that the Unions, in clear and unmistakable terms, waived their right to engage in sympathy strikes. Once we determine that the langauge is susceptible of this interpretation, then the issue is submitted to the jury to resolve the ambiguity and decide

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[3] Since *Gary Hobart* involved the review of a decision of the National Labor Relations Board ("NLRB," "the Labor Board," or "the Board") and since, as we develop at pp. 13-16, *infra*, the Labor Board does examine bargaining history, the Seventh Circuit, after stating its holding, added: "But here, if we carry our consideration into that history, our conclusion is only reinforced." *Id.* That conditional statement plainly takes nothing away from the Seventh Circuit "clear and unmistakable waiver" law as we state it in the text.

> if waiver has occurred. [Pet. App. 10a (footnote omitted).]

And the panel majority ultimately sustained the judgment entered by the district court because

> we are satisfied that Morrell presented sufficient extrinsic evidence to establish that the no-strike clause was susceptible to the meaning that it proposed. Therefore, the district court properly allowed the jury to decide the issue of whether the Unions waived their right to engage in sympathy strikes in clear and unmistakable terms. [Pet. App. 15a-16a.]

Thus, the court below did *not* so much as address—much less attempt to answer—the question framed by the Seventh Circuit in *Gary Hobart*: *viz.*, whether the labor contract's text contains "clear and unmistakable language waiving th[e] right [to engage in sympathy strikes]." 511 F.2d at 288. Rather, the panel majority here framed precisely the opposite question: "whether the no-strike clause is 'ambiguous' in the sense that it is reasonably susceptible of the meaning proposed by Morrell." Pet. App. 10a.

Equally to the point, whereas the Seventh Circuit's approach has led that court to reject any resort to extrinsic evidence where a limited no-strike clause is at issue, the Eighth Circuit endorses resort to extrinsic evidence in every case involving a no-strike clause in order to "resolve [an] ambiguity and decide if waiver has occurred," Pet. App. 10a-11a.[4]

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[4] In *Amcar Division, ACF Industries v. NLRB*, 641 F.2d 561 (8th Cir. 1981), a case involving *a broad* no-strike clause, the Eighth Circuit reasoned as follows:

> The contract's no-strike clause provides, "[d]uring the term of this Agreement there shall be no lock out, strike, stoppage of work or slow down." In our view, this is insufficient, in and of itself, to constitute a waiver of the right to engage in sympathy strikes. However, . . . the *broad language of this no-strike clause, when examined in light of the bargaining history . . . and the facts surrounding the parties' actions at issue*

(2) Adding to the confusion in the courts of appeals are the NLRB decisions which have precipitated much of the appellate-court litigation in this area.

In *Gary Hobart Water Corp.*, 210 NLRB 742 (1974), the NLRB had reached the same conclusion that the Seventh Circuit eventually came to for many of the same reasons. Like the Seventh Circuit, the Board stressed that only a "clear and unequivocal" waiver of "the right to engage in a sympathy strike" by "provisions in a collective bargaining agreement" will be given effect. *Id.* at 744. Like the Seventh Circuit, the Board found the provision before it anything but clear and, indeed, the Board was persuaded that the provision was more fairly read as "limited to disputes falling under the contract" because "the no-strike, no-lockout provisions are not only included in the opening paragraph of the grievance provision but are part of the same sentence which sets up the grievance machinery . . ." 210 NLRB at 745.

But whereas the Seventh Circuit in its opinion in *Gary Hobart* found the absence of any clear contractual waiver language dispositive, the Board was less certain in this regard and went on to invoke "additional evidence which shows that the parties' intent was unclear with respect to what the no-strike provision actually covered." 210 NLRB at 746.

In the more recent case of *Bristol Convalescent Home*, 293 NLRB No. 73 (1989), the Board took a similar tack. In that case, as in *Gary Hobart*, the no-strike clause was contained within the labor contract's grievance provision and once again the Board found the contract's "language . . . is not sufficient to bar sympathy strikes" because

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*here*, indicate a clear waiver of the Union's right to engage in a sympathy strike. [*Id.* at 567 (emphasis added).]

The court below labeled *Amcar* "instruct[ive]" notwithstanding the very different contract provisions involved in *Amcar* and in this case. Pet. App. 10a.

> the specific reference to arbitrability indicates that the no-strike provision is functionally related to arbitration and intended to be in effect only when disputes could be resolved by the arbitration process. . . . This apparent relationship between the express no-strike provision and arbitration warrants the inference that the parties intended a narrower limitation on strikes than in cases involving an express no-strike provision that is functionally independent from the arbitration process. [293 NLRB No. 73, Slip op. at 3.]

But unlike the Seventh Circuit, the Board in *Bristol Convalescent Home* was not content to rest its decision on the contract language; rather, the Board went on to state:

> [E]xtrinsic evidence does not demonstrate any broader intent with respect to the contractual ban on strikes. Extrinsic evidence about the parties' discussion and understanding when negotiating the no-strike clause would be of great significance, but there is no such evidence in the record. [293 NLRB No. 73, Slip op. at 4.]

Indeed, in *Bristol Convalescent Home*, the Board expressly relied on *Indianapolis Power & Light Co.*, 291 NLRB No. 145 (1988), its leading case involving *broad* no-strike clauses. And, in *Indianapolis Power* the Board had embraced the view on the interplay between a labor contract's language and extrinsic evidence stated in *Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986):

> In deciding the issue of whether sympathy strikes fall within a no-strike provision's scope, the parties' actual intent is to be given controlling weight and extrinsic evidence should be considered as an integral part of the analysis. [291 NLRB No. 145, Slip. op. at 6-7, quoted in *Bristol Convalescent Home*, 293 NLRB No. 73, Slip op. at 2.] [5]

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[5] *Electrical Workers Local 1395* reasoned that "the words parties use in drafting contracts are only evidence of their intent; the words

Thus, the NLRB decisions interpreting limited no-strike clauses begin from the contract's language and recognize that such clauses, in contrast to broad clauses, cannot be read on their face as clear and unmistakable waivers of the right to engage in sympathy strikes. Yet, at the same time, and pursuant to the same general rule which governs broad no-strike clauses, the NLRB accords great, albeit undefined, significance to extrinsic evidence in interpreting limited no-strike clauses. That is not an approach likely to engender clarity or stability in the law and, as is only to be expected, no such clarity or stability has resulted.

(3) The difficulties the courts of appeals and the Labor Board have had in interpreting no-strike clauses stems in part from their difficulty in interpreting this Court's decision almost forty years ago in *Labor Board v. Rockaway News Supply*, 345 U.S. 71 (1953). In that case an employee who was discharged for refusing to cross a picket line—and whose discharge was sustained by an arbitrator as permissible under the collective bargaining agreement—filed an NLRB charge alleging that the discharge constituted an unfair labor practice. Not surprisingly, this Court found that the unfair labor practice claim was defeated by the contract. After quoting the applicable no-strike clause, the Court set forth its analysis in just three sentences:

> If this be considered ambiguous in meaning, respondent offered, as evidence of its intent and meaning, to prove that during the negotiations one of the demands made by the union was a clause in the contract with reference to work stoppages which would

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are not themselves the parties' intent." 797 F.2d at 1036. Indeed, according to the D.C. Circuit, "the so-called 'plain meaning' rule" is "ill-suited for the interpretation of collective bargaining agreements" and has "fallen from favor in the realm of general contract law"; thus, it is *always* proper to determine the effect of a no-strike clause based upon "extrinsic evidence of the parties' intent even where the contractual language may seem unambiguous." *Id.* at 1036 n.9. *See also Electrical Workers Local 808 v. NLRB*, 826 F.2d 1283, 1296 & n.24 (3rd Cir. 1987).

> have said "No man shall be required to cross a picket line," that this clause was rejected by respondent and the union acquiesced in the rejection and consented to the no-strike clause as above cited. . . . [I]t is not clear whether [the offer of proof] was accepted or rejected. But the arbitrators' interpretation of the contract was in harmony with the offer. [345 U.S. at 79-80.]

*Rockaway News* was decided before this Court, in *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270 (1956), and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), had announced the rule that the statutory rights granted by the NLRA can only be compromised in collective bargaining by a "clear and unmistakable" waiver and had set forth standards for applying that rule. And it is far from clear how *Rockaway News* can best be harmonized with these later precedents.

In this regard it suffices to note here that because the no-strike clause in *Rockaway News* had been authoritatively interpreted by an arbitrator as prohibiting sympathy strikes, that case need *not* be read as even addressing the question, posed in this case, of how the Board and the courts are to proceed in interpreting such clauses in the absence of such arbitral guidance.

Nonetheless, the NLRB has, from time to time, suggested that the extrinsic evidence relating to "bargaining history" was determinative in *Rockaway News*. *Operating Engineers Local 18 (Davis-McKee Inc.)*, 238 NLRB 652, 653 (1978); *see also Keller-Crescent Co.*, 217 NLRB 685, 691 (1975), *enf. denied*, 538 F.2d 1291 (7th Cir. 1976). In contrast, the D.C. Circuit now suggests that *Rockaway News* "rested primarily on the language of the clause itself" and not "upon th[e] extrinsic evidence" there. *Electrical Workers Local 1395*, 797 F.2d at 1034 & n.5. The nearly 100 cases commenting on *Rockaway News* fill in the spectrum formed by these polar opposites.

Until this Court clarifies *Rockaway News* and its relationship to the clear and unmistakable waiver doctrine, inevitably the courts of appeals will continue to be divided in their approach to no-strike provisions and, more generally, to contractual provisions alleged to waive a statutory right granted by the NLRA.[6]

C. The practical and doctrinal significance of the differences that have surfaced in the lower courts and the Labor Board regarding the proper approach to determining when a labor contract provision effects a waiver of a statutory right make this conflict in the circuits one that requires resolution by this Court.

(1) As a practical matter, what ultimately is at stake here is the relative balance of power between unions and employers or, more precisely, the circumstances in which the balance struck by Congress will be deemed to be altered by private agreement. It is a commonplace that under the national labor policy, "economic force" is "'a prime motive power for agreements in free collective bargaining.'" *Labor Board v. Insurance Agents*, 361 U.S. 477, 489 (1960). And whether employees do—or do not—retain their statutory right to engage in a work stoppage in support of a lawful economic strike is of critical importance in determining the amount of "economic force" the striking employees—and the struck employer

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[6] For other examples of the confusion and uncertainty in the lower courts regarding the proper approach to interpreting no-strike provisions, *compare, e.g., NLRB v. Southern California Edison Co.*, 646 F.2d 1352 (9th Cir. 1981); *NLRB v. Gould Inc.*, 638 F.2d 159 (10th Cir. 1980); *NLRB v. C.K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977), *and Delaware Coca-Cola Bottling Co., Inc. v. NLRB*, 624 F.2d 1182 (3rd Cir. 1980), *with, e.g., Ryder Truck Lines, Inc. v. Teamsters Local 580*, 727 F.2d 594 (6th Cir. 1984), *cert. denied*, 469 U.S. 825 (1984); *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455 (3rd Cir. 1981); *W-I Canteen Service Inc. v. NLRB*, 606 F.2d 738 (7th Cir. 1979).

In the first group of cases, no-strike clauses were held not to reach sympathy strikes, although those cases are internally inconsistent regarding the interpretive rules being applied. The latter cases reach the opposite result.

—will enjoy, and ultimately the terms of the agreement that will be reached.

From the employee standpoint, the freedom to honor picket lines is, as Judge Silberman has observed, "fundamental to the union movement." *Electrical Workers Local 1395*, *supra*, 797 F.2d at 1033. When a group of employees commences an economic strike, the striking employees' strength depends on their ability to call upon their fellow union members in other bargaining units to cease working as well and thereby to maximize the economic impact of the strike on the employer's operations.

Conversely, employers seek to confine labor disputes as narrowly as possible to limit a strike's economic effect on the employer's operations. Moreover, employers view "uninterrupted operation during the term of [a labor] agreement" as the "chief advantage which an employer can reasonably expect" from the agreement. S.Rep. No. 105, 80th Cong. 1st Sess. p. 16 (1947).

How these competing interests are reconciled depends in large part on the meaning that is given to no-strike clauses; that meaning, in turn, is a function of the rules that control the process of interpretation. The conflicting interpretative rules followed by the courts of appeals have led to irreconcilable holdings in this regard.

(2) At the same time, the conflict illuminated by the decision below raises doctrinal questions that cut across the entire corpus of the labor law.

This Court has made clear that, at least insofar as the NLRA confers "economic rights" on employees, those rights may be waived by the employees' bargaining representative through a collective bargaining agreement. *See Metropolitan Edison Co.*, *supra*, 460 U.S. at 705. Such waiver questions can and do arise in a variety of contexts; the Board and the courts are often called upon to decide, for example, whether employees, through their union, have waived their right to bargain collectively over

certain terms and conditions of employment, *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989); whether employees have waived their right to engage in various types of concerted activities, *Mastro Plastics Corp., supra*; or whether employees have waived their right to be free from disparate discipline, *Metropolitan Edison Co., supra*.

The conflicting approaches of the Seventh and Eighth Circuits on the issue posed here extends equally to all of these waiver questions. The logic of the Seventh Circuit's position as stated in *Gary Hobart* requires "clear and unmistakable language" in the labor contract to effect a waiver of an NLRA right, and precludes resort to extrinsic evidence except to determine whether such clear contract language was intended to mean what the words on their face apparently say. In contrast, under the approach of the Eighth Circuit panel majority here, wherever contractual language is "ambiguous" the fact-finder is authorized to engage in an *entirely open-ended inquiry into extrinsic evidence of the parties' "intent"* to determine whether a waiver has occurred.

In our view, the Eighth Circuit's approach to the "clear and unmistakable" waiver rule drains that rule of all its vitality and defeats the fundamental policies underlying LMRA § 301. This Court has made clear that the law of labor contracts demands predictability and stability so that the collective bargaining system can function effectively. *Electrical Workers v. Hechler*, 481 U.S. 851, 855-59 (1987). The clear and unmistakable waiver rule as formulated in *Metropolitan Edison* contributes to that end by demanding that certain "undertaking[s]" —those in derogation of statutory rights—be " 'explicitly stated' "; given that demand, as *Metropolitan Edison* teaches, the Court "will *not* infer from a general contractual provision that the parties intended to waive a statutorily protected right" absent such an explicit statement. 460 U.S. at 708 (emphasis added).

Yet under the Eighth Circuit law as stated by the panel majority here, an "ambiguous" provision can constitute an "explicit[] state[ment]" of a waiver depending upon a jury's assessment of extrinsic evidence. Pet. App. 16a-17a. That paradoxical proposition simply does not bear analysis.

(3) Indeed, this is the last case in which extrinsic evidence should suffice to transform "ambiguous" contract language into a "clear and unmistakable" waiver of statutory rights. Arbitrator Wayne Morse (as he then was), explained why in one of the earliest reported decisions grappling with the issue, when he observed:

> There are certain basic tenets of unionism, a knowledge of which can be reasonably charged to all employers. As pointed out by counsel for the union at the hearing, one of the cardinal principles of unionism is that a union will not permit itself to be used as a means of breaking the strength of another union which at the time is out on strike. [*Waterfront Employees Ass'n*, 4 LRRM 1117, 1118 (1939).]

Thus, "[i]n the absence of an express agreement . . . it is to be implied that both parties . . . knew or should have known that [the covered employees] would not pass through . . . a picket line." *Id.*

It is also very much to the point that, as we have seen, over the years the parties to collective bargaining have evolved two basic categories of no-strike promises: broad general promises that there will be no strikes or work stoppages during the contract term; and limited no-strike promises linked to the grievance arbitration system or otherwise specifying certain classes of strikes that are barred. Pp. 6-7, *supra*.

That being so, the logic of the situation is that, where, as here, the parties enter into an agreement of the latter type, such a limited promise—even assuming its limits are imprecise—cannot be read as a clear and unmistakable commitment by the Union to cross lawful picket lines during the term of the labor contract.

* * * *

In conformity with this Court's rules governing its *certiorari* practice, we have to this point confined ourselves to demonstrating that the broad labor law questions raised by this case are worthy of the Court's attention. But we would be remiss if we did not add a few words on how unsatisfactory the court below's rationale is and how unjust its result.

The Eighth Circuit panel majority based its decision on the proposition that the limited no-strike clause here is " 'ambiguous' in the sense that it is reasonably susceptable of the meaning proposed by Morrell." Pet. App. 10a. It is conspicuous that the panel majority never went beyond that empty generality to so much as attempt to explain how the clause's words—which reference the parties' dispute-resolution procedures and prohibit strikes over "such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the . . . agreements"—can be read to clearly and unmistakably prohibit sympathy strikes; *viz.*, strikes which, of course, *cannot* be settled through the agreement's dispute resolution procedures.[7]

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[7] Rather than treating with the language of the no-strike clause, the court below pointed to two *other* provisions of the collective bargaining agreement as creating the perceived "ambiguity" here; neither provision does so.

1. The Eighth Circuit panel majority observed that "Paragraph 3 of Article II of the agreement declares that the agreement shall "establish the means to facilitate peaceful adjustments of *all grievances or other disputes* that may arise between the Company and the Union.' " Pet. App. 15a (emphasis in original.) But sympathy strikes, by hypothesis, are *not* over disputes "between the Company and the Union" that are the signatories to the instant agreement; such strikes involve disputes between different parties over the formation of a different agreement.

2. The panel majority here also relied on the "struck work" clause in the agreement which permits the Sioux Falls employee who report to work and are drawing their pay to refuse some—but not all—work transferred from struck plants. Pet. App. 15a. That provision simply does not address the entirely separate question of whether the employees retain the very different right to *refuse to report to*

Not surprisingly, then, only a *minority* of the Eighth Circuit judges who have reviewed the limited no-strike clause here have found it susceptible to being read as a clear and unmistakable waiver of the covered employees' statutory right to honor lawful picket lines.[8]

It is also very much to the point that Arbitrator Rentfro—one of the three experienced labor arbitrators the parties chose to give authoritative meaning and effect to their collective bargaining agreement—could not have been more emphatic in his ruling: "A construction of this contract which finds a waiver of the right to engage in a mid-term sympathy strike *pushes the language of the contract past the breaking point.*" Pet. App. 93a-94a (emphasis added). The Arbitrator added that he "*f[ou]nd it beyond credulity* that this clause would be understood by two parties as experienced in labor relations as UFCW and Morrell to be a 'clear and unmistakable' waiver of the right to engage in a sympathy strike." Pet. App. 96a (emphasis added).

Nonetheless, the Union has been assessed $24,600,000 in damages on account of the Sioux Falls employees' determination to honor a lawful picket line at their plant. The fragile decisional foundation we have just outlined cannot support that erroneous judgment and should not be allowed to stand.

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*work* in support of a strike; a right which, of course, entails a loss of their pay and which may be exercised regardless of whether the Sioux Falls plant is handling struck work. Thus, the court below's suggestion that a liimted "struck work" clause creates *an implied obligation to report to work that overrides the statutory right to strike*—a suggestion never to our knowledge embraced by the NLRB or any other court—is plainly wrong.

[8] As we have noted, on the first appeal in this case, a unanimous panel (Judges Lay, Fagg and Bowman) stated that the court "agree[d]" that "the parties' no-strike clause did not prohibit sympathy strikes". Pet. App. 65a. And, on this appeal, while Judge Gibson ruled otherwise—and Judge Bowman joined in this ruling (thereby departing from his earlier view)—Judge McMillian joined Judges Lay and Fagg in concluding that the "no-strike clause did not prohibit sympathy strikes."

## II. THE DECISION BELOW RAISES IMPORTANT AND UNRESOLVED QUESTIONS REGARDING THE RESPECTIVE ROLES OF THE COURTS AND OF LABOR ARBITRATORS IN THE ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS

It is settled law that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1988). In overturning Arbitrator Rentfro's award, the court below did not claim that the Arbitrator's conclusion that the no-strike clause at issue permits sympathy strikes is not an "arguabl[e]" interpretation of the collective bargaining agreement. That court nonetheless held for two reasons that the Arbitrator was not free to arrive at that conclusion.

First, said the court below, Morrell had not "intended to arbitrate the meaning of the no-strike clause," and therefore, in that court's view, "the arbitrator was not 'even arguably . . . acting within the scope of his authority,' *Misco*, 484 U.S. at 38, in interpreting the no-strike clause." Pet. App. 31a. Second, in any event, the court below concluded that "the jury's verdict that the no-strike clause prohibited sympathy strikes . . . b[ou]nd the arbitrator here," and the Arbitrator's conclusion that the contract did not require him to give the verdict preclusive effect "fails to draw its essence from the contract." Pet. App. 31a.

As we proceed to show, each of these rulings raises an important and unresolved question regarding the respective roles of the courts and labor arbitrators in enforcing collective bargaining agreements.

A. (1) At the arbitration hearing in this case, the parties agreed to submit a broad and general question to the Arbitrator for resolution: "Do the seniority and discrimination provisions of the parties' collective bargain-

ing agreement apply to the recall of those employees who were on sympathy strike from May 1 to November 4, 1987?" Pet. App. 28a-29a. Arbitrator Rentfro concluded that to resolve this question it was necessary for him first to determine whether the sympathy strikers had engaged in conduct permitted or proscribed by the contract:

> The fundamental issue presented to the Arbitrator at this stage is what rights, if any, this contract gives the sympathy strikers vis a vis the cross-overs and replacements. The Union grounds its arguments in the assumption that the strike was not a breach of the contract. Morrell relies, fundamentally, on its assertion that the strike was a breach of contract. Before reaching any other issue it is necessary to address this fundamental disagreement in the very premises of the parties' arguments. [Pet. App. 91a.]

The court of appeals overturned the resulting award which rests on the Arbitrator's construction of the no-strike clause, because "[w]e are not persuaded that . . . Morrell intended to arbitrate the meaning of the no-strike clause." Pet. App. 29a.

(2) Arbitration is, to be sure, "a matter of contract." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 482 (1960). Arbitrators thus "derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648-49 (1986).[9]

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[9] It follows that "a party cannot be required to submit to arbitration any *dispute* which he has not agreed so to submit," *Warrior & ity*—whether a collective bargaining agreement creates a duty to arbitrate *the particular grievance*—is undeniably an issue for judicial determination, *AT&T Technologies, supra* (emphasis added).

While the court below thought otherwise, it is plain that these propositions support rather than defeat the Arbitrator's exercise of jurisdiction here. It is undisputed that the "dispute" and the Union's "grievance" over Morrell's treatment of the sympathy strikers who returned to work was subject to arbitration; indeed, when *Golf, supra* (emphasis added), and that "the question of arbitrabil- the Union sued to compel arbitration of that grievance Morrell acknowledged the arbitrability of the grievance.

The court below's major premise was that these basic propositions of labor arbitration law limit arbitrators, *in the course of adjudicating even admittedly arbitrable grievances*, to deciding only those questions on the labor contract's meaning that *both* parties intended to submit for resolution. And the court below further understood *Warrior & Gulf* to authorize the judiciary—as part of its responsibility to assure that arbitration remains consensual—to enforce this limitation by overturning arbitral awards that resolve issues which, in the view of a reviewing court, were not jointly submitted for resolution.

The Eighth Circuit's reading of *Warrior & Gulf* in this regard stands in direct conflict with the Sixth and Tenth Circuits' understanding of the governing rule.

In *Food and Commercial Workers Local 7R v. Safeway*, 889 F.2d 940 (10th Cir. 1989), the parties submitted the following issues to the arbitrator:

> Did the Company violate the Labor Agreement when it failed to recall Grievant . . . from layoff . . .? If so, to what relief is Grievant entitled? [*Id.* at 947.]

The arbitrator answered the first question in the affirmative and held that the grievant was entitled to back pay. The arbitrator went on to assess a portion of the back pay award against the union in that case because the union had "delay[ed] in bringing the matter to arbitration." *Id.* at 942. The union sued to overturn the award, claiming the arbitrator "exceeded his authority by assessing . . . back pay . . . against the Union" as that issue had not been submitted. *Id.* The Tenth Circuit enforced the award, reasoning as follows:

> The parties may limit the discretion of the arbitrator, such as through submitting a precise statement of the issues to the arbitrator or through providing express limitations in the collective bargaining agreement. . . When the parties fail to limit the scope of the submission, however, we will affirm the arbitrator's award if it draws its essence from the collective bargaining agreement and is not contrary to the express language of that agreement. [*Id.* at 947 (citations omitted).]

With specific reference to the case before it, the Tenth Circuit added:

> Because the issue submitted fails to expressly restrict the party from whom relief would be available, the arbitrator could interpret it as encompassing whatever remedy was necessary and permissible under the collective bargaining agreement . . . [*Id.*]

*Johnston Boiler Co. v. Local Lodge 893*, 753 F.2d 40 (6th Cir. 1985) is to the same effect. There, the grievance alleged a discharge without just cause; the arbitrator sustained the grievance on the ground that the discharge was procedurally improper, and the employer challenged the award as exceeding the arbitrator's authority.

The Sixth Circuit rejected the challenge, explaining that "[t]he determination of procedural fairness is sufficiently integral to 'just cause'" to allow the arbitrator to reach that issue in the absence of a joint submission "mak[ing] it clear that procedural fairness was not in question." *Id.* at 43. "[T]he presumption of authority that attaches to an arbitrator's award applies with equal force to his decision that his award is within the submission." *Id.*[10]

(3) While this Court has recently had occasion to clarify the role of the courts in reviewing the merits of an arbitral award deciding issues presented by a properly submitted grievance, *see Paperworkers v. Misco, Inc.*, *supra*, the Court has never addressed the role of the courts in reviewing arbitral determinations as to what issues *are* presented by a properly submitted grievance. The circuit conflict that has resulted gravely threatens the federal policy favoring the arbitration to labor disputes.

Under the rule adopted by the Eighth Circuit in the instant case—in contrast to the rule of the Sixth and Tenth Circuits—the judiciary must "determine, case by case, the exact scope of submission in the endless number

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[10] *See also Pack Concrete Inc. v. Cunningham*, 866 F.2d 283 (9th Cir. 1989); *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299 (3rd Cir. 1982).

of grievances and disputes that inevitably occur between employers and employees," thereby undermining the goal of a "expeditious and relatively inexpensive means of settling grievances." *Mobil Oil Corp.*, *supra*, 679 F.2d at 302.

Of equal moment, under the Eighth Circuit's rule either party to a collective bargaining agreement may, with impunity, trump the arbitration provision of the collective bargaining agreement by unilaterally withholding its consent to the arbitration of a *particular issue*, no matter how integral that issue may be to the decision of an arbitrable grievance.

In both these respects, the Eighth Circuit rule cuts directly against the federal policy favoring the arbitration of labor contract disputes. That being so—and there being a conflict in the circuits, this aspect of the instant case merits plenary review by this Court.

B. As an alternative ground for overturning the Arbitrator's award, the court below held that "under the doctrine of res judicata"—or, more "[t]echnically . . . the doctrine of collateral estoppel"—the Arbitrator "was bound by the jury's finding that the collective bargaining agreement prohibited sympathy strikes." Pet. App. 31a. That holding, too, merits plenary review by this Court.

(1) In *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), this Court considered an analogous issue: whether an arbitrator is bound to give preclusive effect to a *prior arbitral determination* involving the same contract and the same parties. The arbitrator in that case answered that question in the negative and this Court agreed with that answer.

*W.R. Grace* starts from the proposition that the arbitrator's "conclusion that he was not bound by the [prior] decision was based on his interpretation of the bargaining agreement's provision defining the arbitrator's jurisdiction and his perceived obligation to give a prior award a preclusive effect." *Id.* at 765. That being so, "[r]egardless of what our view might be of the correctness of

[this] contractual interpretation, the Company and the Union bargained for that interpretation. *Id.* The Court added:

> Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrators. Barrett's [the second arbitrator's] conclusion that Sabella [the first arbitrator] acted outside his jurisdiction and that this deprived the Sabella award of precedential force under the contract draw their "essence" from the provisions of the collective-bargaining agreement. [*Id.*]

(2) Because *W.R. Grace* addresses the preclusive effect of a prior arbitration award, we do not claim that the decision there *necessarily* resolves the question posed here as to the preclusive effect of the jury verdict. In this regard it is enough to note that question whether the res judicata effects of judicial determinations and arbitral determinations are equivalent is unsettled. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222-23 (1985); *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

But we do submit that the reasoning of *W.R. Grace* applies with equal force in the instant context. Regardless of the nature of the forum which rendered the prior decision, an arbitrator's decision as to whether he is bound by the results of prior litigation "is itself a question of contract interpretation that the parties have delegated to the arbitrator." Indeed, a rule that a prior judicial determination *as to a labor contract's meaning* has a more binding effect than a prior arbitral determination in a subsequent proceeding under the contract's arbitration clause turns the law of labor arbitration upside down. For the basic premise of that law applicable here is that

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bar-

> gained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. [*Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 599 (1960).]

It is also very much to the point that the court below failed utterly in its effort to distinguish *W.R. Grace*. The panel majority here dismissed the relevance of this precedent on the ground that "the requirements of issue preclusion were not met" in that case. Pet. App. 33a. But the *W.R. Grace* Court *expressly declined* to decide whether that was so; "regardless of what our view might be," the Court left it to the second arbitrator to decide what were the "requirements of issue preclusion" and whether those requirements were met. 461 U.S. at 765.

(3) In the instant case, there are especially strong reasons why the Arbitrator should have been allowed to decide the contract issue *de novo*. Prior to Arbitrator Rentfro's ruling, the Eighth Circuit, in overturning the preliminary injunction against the sympathy strike, had found that "the parties' no-strike clause did not prohibit sympathy strikes." P. 3 *supra*. And while the jury had reached a contrary verdict before the Arbitrator issued his award, judgment had not yet been entered on that verdict and thus the verdict was not yet subject to appellate scrutiny. In this circumstance, a substantial additional question exists as to whether the jury verdict was even entitled to preclusive effect in any forum.

It is "familiar law that only a final judgment is res judicata." *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28-29 (1916). The panel majority, in agreement with the Second Circuit, understood the need for a "final judgment" to " 'mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.' " Pet. App. 35a, *quoting Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir.

1961), *cert. denied*, 368 U.S. 986. But that understanding, which virtually defies principled application, is *not* the uniform understanding of finality in the courts of appeals.

Other circuits take the position that at least certain interlocutory orders—which, by definition, may be "revise[d] or set aside" by the district court and which are "not appealable"—are *not* entitled to collateral estoppel effect. *Avondale Shipyard, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269 (5th Cir. 1986) (partial summary judgment ruling); *see Luben Industries Inc. v. United States*, 707 F.2d 1037 (9th Cir. 1983) (dismissal of one claim); *cf. Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 58 USLW 3595 (1990) (judgment dismissing claims unreviewed on appeal).

Since the doctrine of collateral estoppel "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct," *Standefer v. United States*, 447 U.S. 10, 23 n.18 (1980), it is, moreover, all but impossible to understand how a jury verdict which had not been subject to appeal and which stood in square conflict with a prior appellate-court ruling could preclude Arbitrator Rentfro from performing his assigned task of interpreting the collective bargaining agreement.

Given the multiple reasons for doubting the correctness of this aspect of the decision below—and the unsettled nature of the preclusive effects of interlocutory decisions—the Eighth Circuit's collateral estoppel ruling also warrants this Court's review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## STATUTORY APPENDIX

The National Labor Relations Act, as amended, 29 U.S.C. § 151 et. seq., provides in pertinent part as follows:

Section 7, 29 U.S.C. § 157.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 13, 29 U.S.C. 163.

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

The Labor-Management Relations Act of 1947 provides in pertinent part as follows:

Section 301(a), 29 U.S.C. § 185(a).

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 203(d), 29 U.S.C. § 173(d).

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.